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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

JEPPESEN & COMPANY,
Petitioner,

VS.

BARBARA A. BROCKLESBY, et al.,
and the UNITED STATES OF AMERICA,
Respondents.

BRIEF OF BARBARA BROCKLESBY, ET AL. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ALBERT R. ABRAMSON
(COUNSEL OF RECORD)
GERALD CLAUSEN
ABRAMSON & SMITH
44 Montgomery St.
Suite 4211
San Francisco, CA 94104
Telephone: 415/421-7995

FLOYD A. DEMANES
1800 Trousdale Drive
Burlingame, CA 94010
Telephone: 415/692-3344

PAUL SCARBOROUGH
111 Sutter St., 19th Floor
San Francisco, CA 94104
Telephone: 415/397-2010

DANIEL U. SMITH
ERIC G. SCHEIE
LAW OFFICES OF
DANIEL U. SMITH
P.O. Box 278
Kentfield, CA 94914
Telephone: 415/461-5630

Attorneys for Respondents
Barbara Brocklesby, et al.

Dated: December 30, 1985

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

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QUESTIONS PRESENTED

1. Whether this Court should consider the First Amendment issue raised in the Petition for Certiorari when it was neither raised in the District Court nor decided by the Court of Appeal.

2. Whether the First Amendment prohibits state regulation, in the form of imposition of tort liability for damages, of defective aviation charts which cause injury to person and property.

3. Whether in a tort action further proceedings are rendered moot by payment of the underlying judgment by the defendant's insurance carriers in exchange for satisfaction of judgment.

4. Whether a judgment in a diversity case based on a general verdict supported by alternative theories of liability should be affirmed in conformity with state rules of appellate review where sustainable by any one or more of the alternative theories.

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BRIEF OF BARBARA BROCKLESBY, ET AL. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

INTRODUCTION

Respondents Barbara A. Brocklesby, Nancy Evans, Estate of Frank Evans, Norma Lee Mobley Chapman and World Airways, Inc. respectfully pray that this Court deny the petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on August 2, 1985, for the following reasons:

1. Jeppesen waived its First Amendment objection by failing to raise it in the District Court, thereby precluding plaintiffs from presenting evidence on the issue and requesting a special verdict, and the Ninth Circuit declined to decide the issue.

2. First Amendment protection does not apply to navigation charts because they are directions and invitations to action on a matter of purely private concern, similar to commercial speech. As such they are subject to reasonable state regulation in the form of strict liability for injuries caused by defects in aviation charts.

3. The case is moot because Jeppesen's insurance carriers have paid off the judgments and settled the cases in exchange for complete satisfaction of judgment.

4. In this diversity action, the Court must apply the California rule that a general verdict supported by alternative theories must be affirmed if any of the alternative theories is without error.

PROCEEDINGS BELOW

The Ninth Circuit affirmed judgment against petitioner Jeppesen & Company ("Jeppesen") and for plaintiffs/respondents ("plaintiffs") on a general jury verdict after a 49 day trial for the deaths of the crew members and the destruction of World's DC-8 cargo airplane. The case was tried, and the District Court instructed the jury, on three theories of liability: negligence, breach of express or implied warranty, and product liability. Jeppesen did not object on First Amendment or on any other grounds to the strict liability instructions as it was required to do. F.R. Civ. P. 51. The liability theories were based on substantial evidence of defects in petitioner's chart, of which Jeppesen failed to warn, so that the chart failed to provide information necessary to guide the

aircraft safely to a landing. Plaintiffs also sued the United States ("the Government") under the Federal Tort Claims Act (28 U.S.C.A. § 2671, et seq.) claiming that the instrument approach procedure designed by the Federal Aviation Administration ("FAA") was in violation of its own standards and criteria for such procedures. The cases were tried simultaneously, the diversity action against Jeppesen being heard by a jury and the FTCA action against the Government being heard by the Court. The United States at no time claimed an immunity.

Following the jury verdict against petitioner, but before the District Court had ruled on the FTCA case, plaintiffs settled with the Government for Five Million Dollars. Jeppesen received a credit in the amount of the settlement. Jeppesen currently possesses a claim against the Government for indemnity of the balance of the judgment, which the Ninth Circuit ruled must be presented before the United States Court of Claims. Jeppesen Petition Appendix B at 7.

After affirmance of the judgment by the Ninth Circuit, Jeppesen's three liability insurance carriers paid the judgment piecemeal in proportion to their obligations to Jeppesen. All the funds have been disbursed to plaintiff heirs and World Airways. Not until the last payment of approximately 9% of the judgment plus interest did Jeppesen attempt to claim its payment was "without prejudice" to further appellate review. Moreover, despite such claim Jeppesen submitted, and plaintiffs acknowledged, a "complete and full satisfaction of said judgment."

STATEMENT OF THE CASE

I. Defects in Jeppesen's Chart Caused the Crash

World 802 was on a contract cargo flight from Travis Air Force Base, California, to the Phillippines with an intermediate stop at Cold Bay, Alaska.[1] It was flying on a Doppler flight plan (that is, without the assistance of any land-based navigational aids) and

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[1] RT 3370:16-3371:6 In this brief the following abbreviations are used: RT (Reporter's Transcript), ER (Appellant's Excerpt of Record), 2 ER (Plaintiffs' Excerpt of Record).

was over water from the time it left California until it neared Cold Bay.[2]

The crash occurred on September 8, 1973, at 5:42 a.m. while World 802 was in a transition stage of flight[3] between enroute and the beginning of an instrument approach in clouds and darkness for landing. Unable to see anything outside the cockpit, the crew was flying the aircraft solely on instruments[4] and was using Jeppesen's Approach Chart for guidance.

The crew executes an instrument approach procedure ("IAP") based on radio signals from navigational aids known as a "VORTAC" and a Localizer. The VORTAC facility transmits two items of information to the aircraft. First, it sends out 360 radio signals known as "radials", like spokes of a wheel.[5] From these, aircraft instruments show which radial or compass degree the aircraft is on in relation to the VORTAC.[6] Second, the VORTAC sends out information received by the aircraft's distance measuring equipment ("DME"), revealing the aircraft's distance in nautical miles from the station.[7] The localizer directional beam is picked up by the aircraft[8] and a needle on a cockpit instrument will start to move toward the center as the aircraft gets close to the localizer course.[9] The crew then turns the aircraft inbound and follows the localizer in to the runway.[10]

After an air traffic control clearance, the crew began a descent from its enroute altitude of 31,000' to one of 3,500', the prescribed

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[2] RT 3370:16-24.

[3] RT 3397:1-6; 3398:13-20.

[4] RT 2529:2-4; 2532:16-24.

[5] RT 1055:24-1056:7; 2360:17-21.

[6] RT 2360:21-25; 2361:1-20.

[7] RT 2534:13-21.

[8] ER 47:4-7.

[9] RT 2360:7-16.

[10] RT 2477:19-22.

initial approach altitude for intercepting the localizer course between 40 and 19.5 DME.[11] Erroneous navigational signals from the VORTAC falsely led the crew to believe it was flying over water, some 40-80 miles south of its actual course, rather than over rugged, mountainous terrain.[12]

About 40 miles out, at a critical portion of the flight, the crew lost the DME signal and thus did not know the aircraft's distance from the station.[13] Although, the signal returned at 29 DME,[14] shortly thereafter a "false" localizer signal from the transmitting facility indicated to the captain that he was intercepting the localizer back course approach. He therefore began a right turn to proceed inbound on the localizer center line.[15] Second later, World 802 crashed into 4,961-foot Mt. Dutton at about the 3,500-foot level, some 18 miles east of the Cold Bay VORTAC.[16]

The evidence proved that the procedure on Jeppesen's chart was defective for (1) lack of a DME arc, feeder route, or other transition at an appropriate altitude from the enroute phase to the IAP, (2) designation of an altitude at the intial approach fix of 3,500', which was 2,000' below the minimum altitude in that area for reception of useable VORTAC signals. (3) In addition, the chart itself was defective for failure to warn of these defects.

Instrument approach procedures are required by law to conform to the criteria contained in the United States Standards for Terminal Instrument Procedures ("TERPS"),[17] as was acknowledged by the President of Jeppesen,[18] who was familiar with the

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[11] ER 46:4-9; 4611-13; RT 2606:5-20; 506:9; 507:21; 509:16-19.

[12] RT 583:6-18; 583:24-584:14; 587:9-589:2; 594:10-596:12; 2561:18-2563:6; 2494:3-18; 2460:9-21.

[13] RT 2144:10-2145:4; 2471:23-2473:16.

[14] RT 2609:24-2610:1; 3726:16; 3728:8.

[15] RT 2476:11-2479:18.

[16] ER 47:24-28.

[17] 14 C.F.R. § 97.20.

[18] RT 2872:1-3.

manual, as were Jeppesen employees who attended an FAA course on TERPS criteria and standards.[19] The first two defects violated TERPS requirements.[20] The manual states in Section 1:

> This handbook contains criteria which will be used to formulate, review, approve, and publish a procedures for instrument approach and departure of aircraft to and from civil and military airports . . . .[21]

The IAP was formulated by the Government, and reviewed and published in graphic form by Jeppesen. This is the "law" for which Jeppesen claims First Amendment immunity from strict liability, even though defects in the procedure and Jeppesen's failure to warn of them caused death and destruction. The "law" is a verbal description of an instrument approach procedure on a FAA form 8260-5.[22] Jeppesen takes these words and numbers and it illustrates them graphically on its chart,[23] just as does the United States Coast and Geodetic Survey in a different format, and as anyone in free to do. This chart is copyrighted and contains Jeppesen's corporate logo. Jeppesen charges Colorado sales tax[24] and refers to its charts in its internal manuals and advertising materials as "products".[25] As shown above, the IAP illustrated on Jeppesen's chart did not comply with TERPS criteria as required by law. In other words, the IAP was itself in violation of Government regulations.

A. The Absence of a Transition

Prior to the accident, an FAA procedure specialist originally proposed a 40 DME transition arc with an 8,000 foot altitude

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[19] RT 2867:9-18.

[20] RT 4100:5-19; 1984:4-1985:1; 2 ER 14.

[21] 2 ER 2.

[22] RT 2819:13. A copy of the procedure incorporated by reference in the Federal Register is attached as Appendix A.

[23] RT 2872:1-8. A copy of the chart is attached as Appendix B.

[24] RT 2584:10-17.

[25] RT 2584:1-9; 2 ER 64, 79, 81, 113.

restriction, but it was deleted before the procedure was published.[26] Such an arc would have kept World 802 40 miles away from the VORTAC at an altitude of 8,000 feet, 20 miles from and substantially above Mt. Dutton.[27] Following the crash, a 30 DME transition arc was incorporated into the approach procedure.[28] Ironically, for years prior to the crash Jeppesen had published charts depicting instrument approches on the opposite end of the same runway at Cold Bay containing DME transitional arcs.[29]

The evidence established that in designing IAPs the FAA was also required to follow the provisions of the Flight Procedures and Airspace Handbook ("FPA Handbook").[30] Both the FPA Handbook and the TERPS Manual required that IAPs contain transitions between the enroute structure and the final approach. The FPA Handbook set forth the following requirement:

> Instrument approach procedures should provide a smooth transition from the enroute structure and provide the pilot with sufficient information to effect a safe and expeditious approach.[31]

TERPS also required that "feeder routes which provide an operational advantage shall be established and published," and "[p]ositive course guidance shall be provided for feeder routes."[32]

The 40 DME transition arc proposed but never adopted would have satisfied this requirement;[33] instead—in violation of FAA

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[26] RT 944:25-949:8; 953:23-954:23; 959:16-969:24; 961:13-963:13; 967:14-24; 969:13-25; 1031:20-1032:1; 1042:14-18; 1044:25-1047:1.

[27] RT 972:1-974:2; 1040:1-1041:16; 1079:2-25; 1639:7-1640:17; 2615:8-2616:14.

[28] RT 1250:25-1252:13; 1254:1-16; 1370:23-1373:3. This post-accident IAP was depicted on a subsequent Jeppesen chart, Appendix C.

[29] RT 1032:2-1035:19; 1040:14-21; 1216:19-1217:12, ER 7-8, 23.

[30] RT 1016:11-18.

[31] 2 ER 11.

[32] 2 ER 4, 5.

[33] RT 1031:20-1032:1.

requirements—no transition was provided. William Bersch, head of the FAA's Flight Procedure Unit at the time of the accident, stated that he studied the back course IAP after the crash and found there was a "gap" between the enroute and terminal phases of flight because there was no transition.[34]

B. The Conflict Between Initial Approach Fix Altitude and Minimum Altitude for Reception of Navigational Signals

The second defect in the procedure on Jeppesen's chart was that it showed an altitude for intercepting the initial segment of the localizer course of 3,5000', which was 2,000' below the minimum altitude necessary for receiving signals from the VORTAC. The Cold Bay VORTAC was not useable at altitudes below 5,500' for aircraft 40 miles or more from the station. This permanent facility restriction was contained in a Notice to Airmen published by the FAA in its Alaska Supplement,[35] source material utilized by Jeppesen when analyzing a procedure before its publication.[36]

The specification of an initial approach fix altitude 2,000' below the facility useability restriction was in violation of Section 214.32014 of the United States Standard Flight Inspection Manual, which requires a review of facility restrictions to determine that procedural use is not authorized within any unuseable portions of associated facilities.[37]

Mr. Rosenkrans, Jeppesen's President, admitted these defects in Jeppesen's chart when he testified that "the pilot of World 802 was not provided a pre-determined routing" such as a transition arc from the enroute to the instrument approach procedure "to provide for adequate radio reception and for terrain clearance.[38]

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[34] RT 4100:5-19.

[35] RT 1380:23-1381:1; 4103:3-4105:25; 2 ER 165-170.

[36] RT 2840:25; 2 ER 94; 2838:21-2840:2.

[37] 2 ER 14; RT 1984:4-1985:1.

[38] RT 2815:8-23.

He further admitted that the chart did not show the 5,500' minimum reception altitude for radio signals 40 miles from the Cold Bay transmitter.[39] Instead, the chart indicated the plane could descend to 3,500' at 40 miles from the airport transmitter.

C. The Absence of a Warning

Jeppesen's chart failed to provide warnings of any kind concerning the absence of a transition arc and the conflict between the initial approach fix altitude and the minimum VORTAC reception altitude, despite the fact that Jeppesen had the ability and authority to do so and should have added such warnings to the chart.

Had Jeppesen's chart contained a transition arc at a safe altitude and distance from terrain, had it contained an initial approach fix altitude which did not conflict with the minimum signal reception altitude, or had it at least warned of these defects, World 802 would not have desecended below 5,500' until it was on the localizer course and would not have crashed into Mt. Dutton.[40]

II. Theories of Liability Against Jeppesen at Trial

Plaintiff introduced evidence on three theories of liability against Jeppesen at trial: breach of warranty, negligence and strict product liability. The jury was fully instructed on each theory.[41]

A. Breach of Warranty

Plaintiffs contended at trial that Jeppesen expressly and impliedly warranted that its charts were free of defect and contained everything a pilot needed to make a safe approach and landing,

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[39] RT 2849:13.

[40] RT 3984:9-14; 3955:1; 750:5-8; 1987:7-24; 2614:15-2616:25; 3561:5-3562:20.

[41] Jeppesen's First Amendment challenge is directed solely to strict liability, and the Ninth Circuit's affirmance of the judgment was proper in this diversity action because under California law a general verdict must be affirmed if supported by any error-free theory such as breach of warranty or negligence. See Part IV of this brief.

that World Airways relied on these warranties in subscribing to the charts and that publication of the defective chart in this case constituted a breach of the warranty which proximately caused plaintiffs' injuries.

Jeppesen & Company is the "publisher" or "manufacturer" of international aeronautical charts and maps. Jeppesen describes itself as a supplier of "quality products" containing "[c]urrent, accurate data."[42]

Jeppesen advertised it charts as:

> [T]ime-tested and proven by instrument pilots throughout the world. Every necessary detail is clearly indicated .... Jeppesen approach plates include: ... EVERYTHING you need for a smooth transition from enroute to approach segment of your flight.[43]

Jeppesen's literature also claimed:

> Every necessary detail is clearly indicated. Information is located in one place to eliminate the necessity of searching through several sources.[44]

World's personnel relied upon these warranties in subscribing to Jeppesen's materials.[45]

Jeppesen breached its warranty by publishing a chart with an approach procedure that in fact did not provide "EVERYTHING" a pilot needed from enroute flight to the approach segment for landing.

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[42] 2 ER 114.

[43] 2 ER 111, 118.

[44] 19 2812:1-4; 2 Er 118.

[45] RT 3850:4-3851:1, 5-16. Jeppesen did not object to the instructions on express warranty, and does not complain of them in its petition for certiorari, even though liability for express warranty is just as "strict" as products liability in that no showing of fault is necessary.

B. Negligence

Plaintiffs contended that Jeppesen was negligent in failing to recognize the defects in the Government's approach procedure, failing to bring them to the attention of the FAA and failing to warn pilots of the defects.

Jeppesen recognized the need and assumed responsibility for publishing safe instrument approach charts. Its President, Mr. Rosenkrans, testified that because a crew flying under instrument conditions in bad weather at night does not have the time nor the necessary information to determine safe altitudes, reception altitudes, or a transition from the enroute to the airport approach,[46] Jeppesen's Production Specifications Manual required that its charts contain "built-in safety factors" to assist the crew under difficult conditions:

> The increase in instrument navigation and the need to maintain an all-weather flying capability also bear on the requirement of charts of high quality. This is even more apparent when considering the psychological factors of instrument flying, frequently conducted under adverse weather conditions. The inability to observe first-hand all the forces that bear on the aircraft in flight and the limited time available in which critical decisions must be made, contribute to the requirement for optimum presentation of information. Therefore, the charts we produce, including associated tabulated aeronautical data, should contain built-in safety factors that preclude ambiguity and misinterpretations and provide for rapid identification of correct information. Of all the elements involved, accuracy of data cannot be overemphasized.[47]

Jeppesen's First Amendment argument ignores Jeppesen's ability to warn of defects in the FAA approach procedure, to add information on its charts in addition to the FAA approach procedure, and to advise and influence the FAA to make necessary changes in the approach procedures it published. The prem-

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[46] RT 2830:19; 2831:6.

[47] ER 89, RT 2834:4-21.

ise of Jeppesen's argument is that it merely published the FAA procedure which was beyond it's control. This premise is false. Jeppesen's chart contained much more information than the FAA approach procedure and Jeppesen did, in fact, have substantial influence with the FAA to improve the safety of the procedure.

Jeppesen is authorized to, and does provide information on the chart beyond that contained in the procedure.[48] Such additional data includes communications frequencies, an airport diagram, runway number, length, width, surface and taxiways, lighting aids, Morse code identification and minimum off-route altitudes.[49] As a private company, Jeppesen can print as much or as little as it wishes.[50] Jeppesen had no contract with the United States and was free to publish FAA procedures in any manner it pleased. Jeppesen obtains this additional information from other sources,[51] including, but not limited to, the Federal Aviation Administration.

Although the FAA designed the instrument approach procedure graphically depicted by Jeppesen, it was Jeppesen's responsibility to evaluate the adequacy of the procedure, to advise the FAA of defects and deficiencies in the procedure, and certainly to warn pilots of inadequacies in the procedure. Mr. Rosenkrans, Jeppesen's President, admitted that Jeppesen has an obligation to check the procedures before printing them for consistency, contradiction and accuracy as well as for any glaring or obvious omissions, transposition of figures, and "that type of thing."[52] Jeppesen directs its employees to check consistency, accuracy, and completeness of information supplied by the FAA.[53] This checking should have resulted in a warning on the chart, based on information in Jeppesen's possession that the minimum reception

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[48] RT 2879:4-14.

[49] RT 2879:4-14.

[50] RT 2881:1.

[51] RT 2880:15-23.

[52] RT 2867:3-8.

[53] RT 2837:5.

altitude restriction on the Cold Bay transmitter was 5,500, higher than Mt. Dutton[54] and 2,000' above the 3,500' initial approach fix altitude specified on Jeppesen's chart.

According to Jeppesen's Production Specifications Manual, Jeppesen employees in Washington should have brought this discrepancy, and the absence of a transition arc, to the attention of FAA officials. The Manual states that Jeppesen's Aviation Information Staff ("AIS") "is to resolve differences or apparent discrepancies in published information utilizing the most expedient and economical means available by contact with the official sources of such information.[55] Jeppesen had an office in Washington whose primary responsibility was to act as liaison with the FAA.[56] The Washington office makes corrections to the FAA approach procedure form and makes inquiries of the FAA so that everything that should have been on the chart would appear.[57] Jeppesen employees had in the past been successful in obtaining changes in FAA instrument approach procedures,[58] and Jeppesen had made contributions to FAA instrument approach procedures by "asking a question" that resulted in a change.[59] Thus, Jeppesen's Washington employee should have brought to the FAA's attention the need for (1) a transition arc at 40 miles from the transmitter requiring a minimum 5,500' altitude and (2) the discrepancy between the 3,500' initial approach fix altitude and the 5,500' minimum reception altitude.[60]

C. Products Liability

Plaintiffs contended at trial that Jeppesen, as the manufacturer and seller of an aviation chart, was strictly liable for injuries

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[54] RT 439:5-440; 6; 9 RT 1134:8-1135:15.

[55] RT 2853:21-24; 2 ER 81.

[56] RT 2857:9-14.

[57] RT 2596:1-9.

[58] RT 2861:1-23.

[59] RT 2862:24-2863:13.

[60] RT 2591:22-2592:1; 2597:5-8; 2597:5-20.

caused by defects in the chart. Plaintiffs contended that the chart contained three such defects which are described in detail in subsection I of this section. The three defects were: (1) the absence of a transition in the instrument approach procedure between the enroute structure and final approach, (2) specification of an initial approach fix altitude for the instrument approach procedure which was 2,000' below the minimum signal reception altitude and (3) the absence of a warning as to the two defects in the approach procedure. It should be noted with regard to defect (3) that Jeppesen was free to add such a warning to its chart even though it could not add to or change the approach procedure depicted on the chart.[61]

The jury was fully instructed on all aspects of strict products liability, including the absence of a warning.[62]

REASONS FOR DENYING THE WRIT

I

THE FIRST AMENDMENT ISSUE SHOULD NOT BE CONSIDERED BY THIS COURT SINCE IT WAS NEITHER RAISED BY JEPPESEN IN THE DISTRICT COURT NOR DECIDED BY THE NINTH CIRCUIT

Jeppesen attempts to advance on appeal an issue which it failed utterly to raise at any time during the nine years that this case was before the District Court. Jeppesen advanced it for the first time on appeal before the Ninth Circuit. That court rightly declined to reach the issue on the ground that Jeppesen had not properly preserved it. Jeppesen Petition, Appendix B at 9, fn. 9.[63]

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[61] RT 2866:17; 2879:4-14.

[62] RT 6232:16-6234:3.

[63] F.R. Civ. P. 51 requires a party to state specifically its objection to a jury instruction in order to complain of it on appeal; as the Ninth Circuit pointed out, Jeppesen failed to make an objection to the products liability instructions given in the trial court. Jeppesen Petition, App. B at 9, n. 9.

The opinions of this Court are legion in holding that the Court will not consider issues which were not raised or passed upon in the courts below. E.g., *Singleton v. Wulff,* 428 U.S. 106, 120 (1976); *Walters v. St. Louis,* 347 U.S. 231, 233 (1954); *Shelley v. Kraemer,* 334 U.S. 1, 8-9 (1948); *U.S. v. New York Tel. Co.,* 326 U.S. 638, 650, fn. 18 (1946); *Becker Steel Co. of America v. Cummings,* 296 U.S. 74, 82 (1935); *Virtue v. Creamery Package Mfg. Co.,* 227 U.S. 8, 38 (1913); *Wood v. Weimar,* 104 U.S. 786, 795 (1881); *Bartemeyer v. State of Iowa,* 85 U.S. 129, 137-138 (1873); *Tome v. Dubois,* 73 U.S. 548, 555 (1867); *Brockett v. Brockett,* 44 U.S. 691, 692 (1845).

> It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below. In *Hormel v. Helvering,* 312 U.S. 552, 556, 85 L.Ed. 1037, 61 S.C. 719 (1941), the Court explained that this is "essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues . . . [and] in order that litigants may not be surprised on appeal by final decision there of issues upon which they had no opportunity to introduce evidence." We have no idea what evidence, if any, petitioner would, or could, offer in defense of this statute, but this is only because petitioner has had no opportunity to proffer such evidence.

Singleton v. Wulff, supra, 428 U.S. 106, 120; See, also, *Walters v. St. Louis, supra,* 347 U.S. 231, 233 ("Of course, we will not undertake to review what the court below did not decide.").

No general exception to this rule exists for constitutional claims. Indeed, this Court has in the past applied the rule in declining to review constitutional claims. *Shelley v. Kramer, supra,* 334 U.S. 1, 8-9: "The only constitutional issue which the appellants had raised in the lower courts, and hence the only constitutional issue before this Court on appeal, was the validity of the covenant agreements as such," citing *Corrigan v. Buckley,* 271 U.S. 323, 330-331 (1926).

In addition to precluding plaintiffs from introducing relevant evidence, Jeppesen's failure to raise the issue in the District Court prejudiced plaintiffs by failing to alert them to the possible

necessity of a special verdict. At trial, plaintiffs advanced three distinct theories of recovery: negligence, breach of warranty and strict products liability. The issue raised by Jeppesen in its petition attacks only the third theory. Had that issue been raised in the District Court, plaintiffs clearly would have requested a special verdict, so that the judgment could be affirmed on either the negligence or breach of warranty theories, thereby rendering harmless any alleged error in the strict products liability theory.

In support of its conclusionary assertion that the "First Amendment is properly before this Court" (Jeppesen Petition at 6), Jeppesen cities *Hormel v. Helvering,* 312 U.S. 552, 555-59 (1941), and *Egan v. Teets,* 251 F.2d 571, 576 (9th Cir. 1957).

Hormel is inapposite. It arose out of a tax case tried before the Board of Tax Appeals. Appeal was to the Circuit Court of Appeals, whose authority to review the decision rested on a special tax statute allowing it to modify or reverse the decision with or without remanding the case, "as justice may require." 26 U.S.C.A. 1940 Ed. § 1141(c)(1). The Circuit Court, relying on a non-Constitutional theory advanced for the first time on appeal by the government, reversed the tax board's decision which had been in favor of the taxpayer.

Upon review, this Court first noted the general rule precluding review on appeal of issues not raised in the trial court. 312 U.S. at 556. However, relying upon the language of the special tax statute noted above, the Court held that the Circuit Court properly considered the theory not previously raised in the trial court.

Unlike *Hormel,* reviewing authority in the present case obviously was not premised on the special tax statute; furthermore, unlike *Hormel,* the Circuit Court in the instant case did *not* pass upon the issue raised in Jeppesen's petition.

The *Egan* case is equally inapplicable. That was a habeas corpus proceeding arising out of a criminal action. The petitioner, whose appeal in state court had been dismissed for lack of timely prosecution, contended that the dismissal resulted because the trial judge to whom he had delivered his handwritten notice of appeal had suppressed the notice in violation of the equal protection clause of the Fourteenth Amendment. The Ninth Circuit,

without citation to authority, stated that "a constitutional question may be raised at any time if the matter appears on the face of the record, or if it is of such nature that it could not have been raised before." 251 F.2d at 576. This rule contravenes the rule of waiver of constitutional issues established by this Court, at least in the context of civil actions. See *Shelley v. Kraemer, supra,* 334 U.S. at 8-9.

II

THE JUDGMENT FOR INJURIES CAUSED BY DEFECTS IN PETITIONER'S CHART DOES NOT RAISE SIGNIFICANT FIRST AMENDMENT ISSUES

A. Jeppesen's Chart Is a Product, Not Speech

Jeppesen misframes the issue by claiming that its chart, which pilots rely upon and use to fly their aircraft safely, is "speech" that merits the protection of the First Amendment to the United States Constitution. Jeppesen's chart is a *product,* not speech.

Jeppesen's argument that products deserve First Amendment protection would revolutionize the common law products liability principle, extant throughout the country, which provides that the absence of proper instructions or warnings can make a product defective and subject its manufacturer to strict liability.[64] Instructions and warnings are, of course, conveyed in words; yet the law treats them as part of a commercial product subject to the laws of strict products liability.[65] In a similar fashion, products liability

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[64] At least 38 jurisdictions provide that the absence or inadequacy of instructions or warnings can make a product defective or unreasonably dangerous. See, Annot., 53 A.L.R.3d 239 (1973) and Supplement (1985). Similarly, federal law can require that a product "to be marked with or accompanied by clear and adequate warnings or instructions. . . " See 15 U.S.C. § 2055(a)(2) (Consumer Product Safety Act). California State law imposes similar requirements as to measurements. Business and Professions Code §§ 12601, et seq.

[65] See, e.g., *Ferebee v. Chevron Chemical Co.,* 736 F.2d 1529 (D.C. Cir. 1984) (defective label); *Brochu v. Ortho Pharmaceutical Corp.,* 642 F.2d 652; 658 (1st Cir. 1981) (defective warning); *Hubbard-Hall*

law also treats navigational charts as products. *Fluor Corp. v. Jeppesen & Co.*, 170 Cal.App.3d 468, 475 (1985) (review denied); *Saloomey v. Jeppesen & Co.*, 707 F.2d 671, 676-77 (2d Cir. 1983) (applying Connecticut law); *Aetna Casualty & Surety Co. v. Jeppesen & Co.*, 642 F.2d 339, 341-342 (9th Cir. 1981) (applying Nevada law). And liability for damages caused by faulty charts has been imposed in innumerable cases. E.g., *Saloomey, supra,* at 679; *Aetna Casualty, supra,* at 342-343; *Reminga v. United States,* 631 F.2d 449 (6th Cir. 1980); *Medley v. United States,* 543 F.Supp. 1211, 1223-1224 (N.D.Cal. 1982); *Allnut v. United States,* 498 F.Supp. 832, 838; (W.D. Mo. 1980); *Murray v. United States,* 327 F.Supp. 835, 841 (D. Utah 1971); *Sullivan v. United States,* 299 F.Supp. 621, 625-626 (N.D. Ala. 1968) aff'd., 411 F.2d 794 (5th Cir. 1969).

The application of products liability law as a form of government regulation in these cases is perfectly consistent with traditional First Amendment theory. Just as conspiracy, *United States v. Cooper,* 606 F.2d 96, 98 (5th Cir. 1979), telephone harassment, *United States v. Lampley,* 573 F.2d 783, 787 (3d Cir. 1978), counseling the filing of false income tax returns *United States v. Freeman,* 761 F.2d 549, 551 (9th Cir. 1985), conveying false information, even in jest, about hijacking a plane, *United States v. Irving,* 509 F.2d 1325 (5th Cir. 1975) and uttering threats upon the President, *Watts v. United States,* 394 U.S. 705 (1969), receive no First Amendment protection merely because they happen to be conducted through words, just as a professional society's ethical rules, *Nat. Soc. of Prof. Engineers v. U.S.,* 435 U.S. 679 (1978), and a trade union's peaceful picketing, *Giboney v. Empire Storage and Ice, Co.,* 336 U.S. 490 (1948), receive no First Amendment protection when they function to restrain trade in violation of the Sherman Act, and just as company newsletters, *S.E.C. v. Suter,* 732 F.2d 1294, 1299 (7th Cir. 1984) and press releases, *S.E.C. v. Texas Gulf Sulphur Co.,* 446 F.2d 1301, 1306 (2d Cir. 1971), receive no First Amendment protection when they violate the Security Exchange Act, so warnings, instructions

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Chemical Co. v. Silverman, 340 F.2d 402, 405 (1st Cir. 1965) (defective label); *Midgley v. S.S. Kresge Co.,* 55 Cal.App.3d 67, 74 (1976) (defective assembly instructions).

and products such as Jeppesen's chart should receive no such protection when they include defects that imperil life and limb. For in none of these cases does speech function as part of a marketplace of ideas. *Abrams v. United States,* 250 U.S. 616, 330 (1919) (Holmes, dissenting). Instead it functions as *action,* or advocacy of action, *Yates v. U.S.,* 354 U.S. 298, 321 (1957), or an invitation to immediate and detrimental reliance. Thus, even though accomplished through words, it is properly the subject of government regulation. "A business . . . cannot avoid regulation merely because it engages in publishing." *S.E.C. v. Suter, supra,* 732 F.2d at 1299.

Under Brandeis' classic formulation, the First Amendment prohibits regulation of speech unless the "danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence." *Whitney v. People of State of California,* 274 U.S., 357, 377 (1927) (concurring opinion). Jeppesen's chart is not an invitation to "full discussion" or "more speech." It is instead simply a device for pilots to use and rely upon to fly their aircraft safely. It is an invitation to action—to immediate and detrimental reliance. As such, it merits no First Amendment protection.

The distinction between true "speech" worthy of First Amendment protection and advocacy of or invitation to action which simply happens to be accomplished through words is aptly illustrated by *Herceg v. Hustler Mag., Inc.,* 565 F.Supp. 802, 803 (S.D. Tex. 1983), cited by Jeppesen in its Petition. In *Herceg* plaintiff claimed that an article entitled "Orgasm of Death," which described the practice of "autoerotic asphyxiation," was a "defective, unreasonably dangerous product" that caused her decedent's death by hanging. The court properly rejected plaintiff's analysis, holding that under the Constitution, the article was protected speech unless the plaintiff could allege and prove, pursuant to *Brandenburg v. Ohio,* 395 U.S. 444, that the "article was 'directed to inciting or producing' the death which occurred

and was 'likely to incite or produce' the death"[66]—in short, that the article was directed to inciting or producing action.[67]

Navigational charts are very different from the magazine article in *Herceg*. Unlike the magazine article, they are published for the *sole purpose* of inciting action in reliance upon them on the part of their users, who are expected to translate into action the symbolized directions embodied in the charts.[68]

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[66] 565 F. Supp. at 805. See, also, *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (speech that threatens human injury or incites lawless action may be regulated without offending the First Amendment); *Hess v. Indiana*, 414 U.S. 105, 109 (1973); *Watts v. United States*, 394 U.S. 705 (1969); *Feiner v. New York*, 340, U.S. 315 (1951); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942); *Schenck v. United States*, 249 U.S. 47, 52 (1919) ("[F]ree speech would not protect a man in falsely shouting fire in a theater and causing a panic."); *Weirum v. R.K.O. General, Inc.*, 15 Cal.3d 40, 48, 123 Cal.Rptr. 468, 539 P. 2d 36 (1975) ("The First Amendment does not sanction the infliction of physical injury merely because achieved by word rather than act.").

[67] In fact, not only did the article *not* incite readers to attempt the practice described, it expressly warned against it. 565 F. Supp. at 805 fn.3.

[68] Petitioner also cites two state cases, *Cardozo v. True*, 342 So.2d 1053 (Fla.App. 1977) and *Walter v. Bauer*, 439 N.Y.S.2d 821 (Sup.Ct. 1981), both of which are distinguishable. *Cardozo* involved a cookbook containing a recipe for cooking poisonous mushrooms. Plaintiff, who became ill after eating one of the *uncooked* mushrooms, contended that the failure to include in the book a warning on the toxic nature of uncooked mushrooms constituted a breach of warranty. No strict products liability theory was advanced. The Florida Appellate Court rejected the plaintiff's cause of action not on First Amendment grounds but upon its interpretation of Florida's statutory and common law breach of warranty doctrines.

Walter involved a plaintiff who was injured while performing an experiment described in defendant's science book. Interpreting New York's products liability law, the court ruled that "plaintiff was not injured by the use of the book for the purpose for which it was designed, i.e., to be read." 439 N.Y.S.2d at 822. There can be no doubt that in the present case the intended purpose of Jeppesen's chart was that it be

B. The Fact That Jeppesen's Chart Reproduces an FAA Regulation Is Irrelevant

Jeppesen again misframes the issue when it asks the Court to declare that "the First Amendment protects the accurate publication of laws and government regulations."

The "regulation" at issue here is not an ordinary law or regulation which sets the limit of legal conduct. It is, instead a precise set of directions which pilots are expected to follow and upon which they must rely for the safety of their aircraft. The purpose in publishing these directions in the Federal Register is to impose upon pilots the legal requirement of following them, subjecting them to disciplinary action for failure to do so. See 14 C.F.R. § 91.116(a). The same end could have been accomplished by simply enacting a general statute or regulation requiring pilots to follow the approach procedures designed and promulgated by the government.[69]

If a navigational chart designed and published by the Government is defective, the Government itself can be held liable. *Reminga v. United States, supra*, 631 F.2d 449, 452; *De Bardeleben v. United States, supra*, 451 F.2d 140, 149; *Medley v. Unites States, supra*, 543 F. Supp. 1211, 1223; *Allnut v. United States, supra*, 498 F. Supp. 832, 838; *Murray v. United States, supra*, 327 F. Supp. 835, 841; *Sullivan v. United States, supra*, 299 F. Supp. 621, 625-626.[70] In short, Jeppesen seeks an immu-

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followed by pilots while flying their aircraft. Furthermore, *Walter* was nothing more than a ruling on a motion by a trial judge, and as such carries no precedential force even in the State of New York.

[69] This sort of approach was employed, for example, in the case of the government regulation requiring pilots to obey verbal clearances and directions issued by air traffic controllers, 14 C.F.R. §§ 91.75, 91.115, and in the case of the government regulation requiring pilots of approaching and departing aircraft to follow airport traffic patterns established by the FAA. 14 C.F.R. § 91.89.

[70] Similarly, the government can be held liable for directions negligently given by an FAA air traffic controller *United Airlines, Inc. v. Wiener*, 335 F.2d 379, 396 (9th Cir. 1964); *Eastern Airlines, Inc. v. Union Trust Co.*, 221 F.2d 62, 79 (D.C. Cir. 1955) and for negligent

nity greater than that afforded the Government itself.[71] Furthermore, Jeppesen did not simply translate a government regulation. It presented a chart with the warranty that it provided "EVERYTHING you need for a smooth transition from enroute to approach segment of your flight." Jeppesen was free to include information other than that required in FAA regulations and indeed did so. For example, Jeppesen's chart included communication frequencies, airport information, minimum off-route altitudes, representations of land and water terrain and representations of mountain peaks along with their corresponding elevations, none of which was included in the government-designed approach procedure. In addition, Jeppesen was free to include and should have included *warnings* of defects in the FAA approach procedure. The absence of a warning constitutes a defect in the chart wholly separate and apart from defects in the approach procedure itself.[72] In other words, the absence of a warning was a defect stemming from Jeppesen for which it is liable even though it could not alter the approach procedure.[73]

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construction of an airport traffic pattern *Foss v. U.S.*, 623 F.2d 104, 105 (9th Cir. 1980), even though (indeed, perhaps especially because) pilots are required to follow them. (See footnote 69.)

[71] This argument by Jeppesen suggests that Jeppesen's own liability is derivative of the Government's. In fact, the reverse is true: Under the Federal Tort Claims Act, the Government is subject to liability only "in the same manner and to the same extent as a *private individual* under like circumstances. . . ." 28 U.S.C.A. § 2674 (emphasis added). Similarly, under the Suits in Admiralty Act, an action against the Government can be maintained only in cases where "if such vessel were privately owned or operated, or if such cargo were privately owned or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained. . . ." 46 U.S.C. § 742.

[72] In *Medley v. U.S.*, 543 F.Supp. 1211, 1221 (N.D.Ca. 1982), the Government was held liable under the Federal Tort Claims Act for failing to place a warning on an aviation chart.

[73] In many cases a product has been found defective because of an inadequate label or warning, *even though* the label or warning complied with government requirements. See, e.g., *Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529, 1541 (D.C.Cir. 1984) (toxic chemical label

C. Imposing Liability for Injuries Caused by Defective Navigational Charts Does Not Offend the First Amendment

Imposition by the states of liability for injuries caused by defective navigational charts constitutes nothing more than reasonable state regulation of commercial products. Jeppesen's attempt to analyze the First Amendment protection due such charts by analogy to libel and defamation cases is misconceived. A more appropriate analogy exists in this Court's analysis of the First Amendment protection afforded commercial speech.

Jeppesen in effect argues that the same First Amendment considerations that are present in the libel cases on *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964) and its progeny are present here. Each of these cases, however, involved matters of public concern and represented a balance between the state interest in compensating private individuals for injury to reputation and the First Amendment interest of insuring freedom of expression on public questions and debate on public issues that is uninhibited, robust and wide open. *Dun & Bradstreet v. Greenmoss Builders,* 105 S.Ct. 2939 (1985).

Dun & Bradstreet involved a credit report issued to five subscribers which falsely described a construction contractor's financial condition. The contractor brought a defamation action. This Court held that permitting recovery of presumed and punitive damages in defamation cases absent a showing of "actual malice" does not violate the First Amendment when the defamatory statements do not involve matters of "public concern". 105 S.Ct. at 2946. In reaching its holding, the Court pointed out that the First Amendment interests there involved were similar to those involved in "commercial speech." 105 S.Ct. at 2947. The same is true here.

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defective even though it complied with government regulations); *Brochu v. Ortho Pharmaceutical Corp.,* 642 F.2d 652, 658 (1st Cir. 1981) (warning defective even though part of FDA-approved "uniform" label); *Hubbard-Hall Chemical Co. v. Silverman,* 340 F.2d 402, 405 (1st. Cir. 1965) (labels inadequate even though approved by Department of Agriculture).

Commercial speech is "expression related solely to the economic interests of the speaker and its audience." *Central Hudson Gas v. Public Service Commission,* 447 U.S. 557, 561 (1980). The term has been applied almost exclusively to speech which advertises or promotes the sale of a commodity or service. See, e.g., *In the Matter of R.M.J.,* 455 U.S. 191 (1982); *Central Hudson Gas, supra,* 447 U.S. 557; *Friedman v. Rogers,* 440 U.S. 1 (1979); *Virginia Pharmacy Board v. Virginia Consumer Counsel,* 425 U.S. 748 (1976). In the present case, Jeppesen's chart does not promote the sale of a commodity but is instead *itself* the commodity. Nonetheless, like the credit report in *Dun & Bradstreet,* it possesses many of the same First Amendment characteristics as commercial speech.

Thus, Jeppesen's copyrighted aviation chart is "speech solely in the individual interest of the speaker and its specific business audience." *Dun & Bradstreet, supra,* 105 S.Ct. at 2947. This particular interest warrants no special protection when—as in this case—the speech is defective and as a result causes not merely damage to a business reputation but death and destruction. Furthermore, as demonstrated above, Jeppesen's chart is a product and not a part of the "marketplace of ideas:"

> [I]t cannot be said that the [navigational chart] involves any 'strong interest in the free flow of commercial information'. There is simply no credible argument that this type of [navigational chart] requires special protection to ensure that 'debate on public issues [will] be uninhibited, robust, and wide-open.'

Dun & Bradstreet, supra, 105 S.Ct. at 2947 (citations omitted).[74]

Finally, the type of spech involved here is more resilient to state regulation than other speech:

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[74] A similar point was made in *S.E.C. v. Texas Gulf Sulphur Co.,* 446 F.2d 1301 (1971), in which the court found that a company's misleading press release violated the Security Exchange Act of 1934. The court rejected the company's First Amendment defense, noting: "[T]he First Amendment deals with the free exchange of ideas and not with commercial 'factual' speech." 446 F.2d at 1306.

> In addition, the speech here, like advertising, is hardy and unlikely to be deterred by incidental state regulation. It is solely motivated by the desire for profit, which, we have noted, is a force less likely to be deterred than others. Arguably, the [chart] here was also more objectively verifiable than speech deserving of greater protection. In any case, the market provides a powerful incentive to a [chartmaker] to be accurate, since [a defective aviation chart] is of no use to [pilots]. Thus, any incremental "chilling" effect of [product liability] suits would be of decreased significance.

Dun & Bradstreet, supra, 105 S.Ct. at 2947 (citations and footnote omitted).

III

PETITIONER HAS ALREADY MADE PAYMENT IN FULL OF THE AMOUNT NECESSARY TO SATISFY AND SETTLE ITS OBLIGATION ON THE JUDGMENT

This Court should not grant discretionary review on certiorari of a judgment that petitioner has satisfied in full, thereby rendering the case moot. Even with respect to the statutory right of appeal, payment of the judgment by the insurance carrier of the defendant's employer places the appellate court "without power to grant relief from the order appealed from, and the case is moot." *Phillips v. Cheltenham Township*, 575 F.2d 72, 73 (3rd Cir. 1978). *Accord, Banger v. Philadelphia Electric Co.*, 419 F.2d 1322 (3rd Cir. 1969) (appeal dismissed as moot after payment to the clerk of penalty on attorney); *Taylor v. United States*, 410 F.2d 392 (5th Cir. 1969) (appeal from contempt fine mooted by payment); *Lesmark, Inc. v. Pryce*, 334 F.2d 942, 943 (D.C. Cir. 1964) (satisfaction of plaintiffs' money judgment requires dismissal of appeal); *Bingham v. Yingling Chevrolet Co.*, 297 F.2d 341, 342 (10th Cir. 1961) (debtor's payment to sole creditor moots debtor's appeal from dismissal of bankruptcy).

Because petitioner has paid respondents, including individual heirs in the wrongful death actions, there is no effective judicial mechanism for restoring the parties to the status quo even in the event this Court reverses the judgment. "[W]here events have

occurred which preclude granting effectual relief to an appellant, an appellate court will dismiss the appeal. [Citation] The payment of a judgment under circumstances where repayment or restitution could not be obtained in event of a reversal bars an appeal." *Leader Clothing Co. v. Fidelity & Casualty Co. of New York*, 227 F.2d 574, 576 (10th Cir. 1955). Even where the appeal is taken pursuant to statutory right, compliance with an order that includes the payment of cash constitutes "action of a character which cannot be reversed by the court of appeals," and where the Court of Appeals becomes "powerless to grant the relief requested by the appellant . . . the appeal will be dismissed as moot." *Thibaut v. Ourso*, 705 F.2d 118, 120-121 (5th Cir. 1983) ("nor can we simply take the $100,000 back from McNutt . . . .").

Petitioner's reliance upon *Cahill v. New York, New Haven & Hartford R. Railroad Co.*, 351 U.S. 183 (1956), is misplaced. The judgment had been satisfied only because the appellant's application to the District Court for stay of execution had been denied and defendant had informed plaintiff that it intended to pursue its appellate remedies notwithstanding payment of the judgment. In dissent, four members of this Court suggested that further appellate review would be appropriate only if judgment was paid "under duress . . . before this Court takes the drastic action of trying to make a plaintiff pay back money that he has received under an order of this court." 351 U.S. at 190-191. By contrast, execution in the instant case was stayed by agreement of the parties. Petitioner's insurance carriers made *voluntary* payment only after the decision of the Court of Appeals and, except for the final 9% of the total recovery, without any notice to respondents that petitioner intended to seek review in this Court.

Although *County of Dakota v. Glidden*, 113 U.S. 222, 224 (1885) does state that a defendant can pay a money judgment and obtain a reversal on appeal, that statement was dictum to distinguish the circumstance there presented of a "new agreement, on sufficient consideration," which had the "effect of extinguishing the judgment now sought to be reversed," rendering "fruitless" the review of error underlying the judgment. 113 U.S. at 225. Consequently the writ of error was dismissed.

The *County of Dakota* decision did not in any way limit this Court's previous holdings that the payment of a tax in full compelled dismissal of a proceeding in this Court to review the validity of the tax. *County of San Mateo v. Southern Pacific Railroad Co.*, 116 U.S. 138 (1885). "[W]hen pending a suit concerning the validity of the assessment of a tax, the tax was paid [citation] or the amount of the tax was tendered, and deposited in a bank, which by statute had the same effect as actual payment and receipt of the money . . . appeals have been dismissed by this court . . . ." *Mills v. Green*, 159 U.S. 651, 654 (1895).

The circumstances of payment are set forth in the declaration of counsel for plaintiffs, Albert R. Abramson, Esq., Appendix D.[75] The payment of the judgment by Jeppesen's insurance carrier was not made at the request of the plaintiffs, nor was it made with any prior indication by Jeppesen that it would reserve its right to appeal until the last 9% was tendered. Certainly plaintiffs did not agree that Jeppesen could obtain further review of the judgment after payment. Finally, the last payment did not fully satisfy plaintiff's claims for interest or for costs and therefore was not satisfaction in full but rather a settlement which does bar further appellate review. *County of Dakota v. Glidden*, 113 U.S. 222, 225 (1885).

IV

THE JUDGMENT IS SUPPORTED BY THEORIES OF NEGLIGENCE AND BREACH OF WARRANTY, WHICH ARE NOT THE SUBJECT OF FIRST AMENDMENT ATTACK.

Respondents sought recovery from petitioner not only on the basis of products liability but also for the petitioner's negligence and breach of warranty. The case was submitted to the jury on all three theories and the jury returned a general verdict in favor of respondents and against petitioner. Thus, even if Jeppesen's First Amendment challenge to products liability had merit, the judg-

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[75] Facts not appearing of record showing payment of judgment "may be proved by extrinsic evidence." *Mills v. Green*, 159 U.S. 651, 653 (1895).

ment would nevertheless have to be affirmed on the unchallenged grounds of negligence and breach of warranty. "A successful party in the District Court may sustain its judgment on any ground that finds support in the record." *Jaffke v. Dunham*, 352 U.S. 280, 281 (1957).[76]

Moreover, in this diversity action, this Court should follow state law in construing verdicts, so that a defect in one theory submitted to the jury will not require reversal of a general verdict where another error-free theory was also submitted to the jury and was supported by sufficient evidence. *Adkins v. Ford Motor Co.*, 446 F.2d 1105, 1108 (6th Cir. 1971):

> Where jurisdiction is founded upon diversity of citizenship and state-created rights are sought to be enforced, this Court has consistently construed a general verdict as the state courts would.[77]

In California "[a] general verdict implies a finding in favor of the prevailing party of every fact essential to the support of his action .... Where a case is tried on alternate theories of liability ... the general verdict implies findings in favor of the prevailing party on all issues submitted to the jury." *Codekas v. Dyna-Lift Co.*, 48 Cal.App.3d 20, 24-25; 121 Cal.Rptr. 121 (1975); *accord, Berger v. Southern Pac. Co.*, 144 Cal.App.2d 1, 5 (1956).

Respondents are entitled to have their general verdict affirmed under the negligence and warranty theories to obtain the same outcome that they would have obtained had this case been tried in

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[76] "Where more than one theory of recovery has been submitted to the jury in a civil case, and where on appeal it is claimed that as to one of the theories there was a lack of evidential support or an error of law in submitting the theory to the jury, the reviewing court has discretion to construe a general verdict as attributable to another theory if it was supported by substantial evidence and was submitted to the jury free from error." *Traver v. Meshriy*, 627 F.2d 934, 938 (9th Cir. 1980).

[77] Accord, *Coal Resources, Inc. v. Gulf & Western Industries*, 756 F.2d 443, 448-449 (6th Cir. 1985); *DeWitt v. Brown*, 669 F.2d 516, 523 (8th Cir. 1982); *Gold v. National Savings Bank*, 641 F.2d 430, 434 (6th Cir. 1981); *Keet v. Service Machine Co., Inc.* 472 F.2d 138, 140 (6th Cir. 1972).

state court. *Guarantee Trust Co. v. York,* 326 U.S. 99, 108 (1945). To accomplish "discouragement of forum-shopping and avoidance of inequitable administration of the laws"[78] petitioner should not be permitted to lie in wait with a First Amendment challenge which it discloses for the first time only on appeal, when California appellate courts would nevertheless affirm the judgment.

CONCLUSION

For the foregoing reasons, respondents Barbara Brocklesby, et al, urge this Court to deny Jeppesen's petition for certiorari.

Dated: December 30, 1985

Respectfully submitted,

ALBERT R. ABRAMSON
(COUNSEL OF RECORD)
GERALD CLAUSEN
ABRAMSON & SMITH
44 Montgomery St.
Suite 4211
San Francisco, CA 94104
Telephone: 415/421-7995

FLOYD A. DEMANES
1800 Trousdale Drive
Burlingame, CA 94010
Telephone: 415/692-3344

PAUL SCARBOROUGH
111 Sutter St., 19th Floor
San Francisco, CA 94104
Telephone: 415/397-2010

DANIEL U. SMITH
ERIC G. SCHEIE
LAW OFFICES OF
DANIEL U. SMITH
P.O. Box 278
Kentfield, CA 94914
Telephone: 415/461-5630

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[78] *Hanna v. Plumer,* 380 U.S. 460, 468 (1965).

Par 13, 14

34-

DEPARTMENT OF TRANSPORTATION - FEDERAL AVIATION ADMINISTRATION
LOS/ITS STANDARD INSTRUMENT APPROACH PROCEDURE
FLIGHT STANDARDS SERVICE - FAR PART 97.25

TERMINAL ROUTES	FROM	TO	VIA
	CDB VORTAC	19.5 DME CDB VORTAC/ CDB LOC (BC)	CDB R-141 & LOC (BC)
	40 DME CDB VORTAC/ CDB LOC (BC) (IAF)	19.5 DME CDB VORTAC/ CDB LOC (BC) (HOPT)	I-CDB LOC (BC)

1A. PROCEDURE TURN South SIDE OF CRS 142° OUTBND 322° INBN
1B.
2. FAF 9.5 DME FINAL APPROACH COURSE 322°
3. Minimum altitude over: 19.5 DME 3500'; 9.5 DME 1
6. MSA 000°-090° 6000'; 090°-180° 6800'; 180°-2

DAY AND NIGH

TAKE OFF ► % Standard

CAT. ►	A			B		
S-32	MDA 400	VIS 3/4	HAT 310	MDA 400	VIS 3/4	HAT
* Circling 14, 26	MDA 560	VIS 1	HAA 462	MDA 560	VIS 1	HAA
** Circling 8	MDA 800	VIS 2	HAA 702	MDA 800	VIS 2	HAA

Procedural Data Notes

1. This procedure not authorized for aircraft not equip
localizer and DME not co-located. DME information from
2. * Circling not authorized West of rwy 14/32 except w
3. ** Night circling rwy 8 not authorized.
4. % Southbound (026° thru 235°) IFR departures must co
5. Air Carrier will not reduce take-off visibility due
6. Approach reference lights, rwy 32, not to be constru
7. % Take off rwy 26, 800-2.

CITY AND STATE	AIRPORT AND ELEVATION

arings, headings, courses and radials are magnetic. Elevations and altitudes are in feet, MSL, cept HAT, HAA, and RA. Altitudes are minimum altitudes unless otherwise indicated. Ceilgs are in feet above airport elevation. Distances are in nautical miles unless otherwise indicad, except visibilities which are in statute miles or in feet RVR.

ALTITUDE	MISSED APPROACH
	MAP 4.5 DME on LOC (BC)
7000'	Climb to 3000' on NW crs. ILS localizer within 15 miles.
3500'	**Additional Flight Data** 1. 1100' Mt. Simeon 2.4 mi. West of airport. 2. 5784' Frosty Peak 7 mi. South of airport. 3. HIRL rwys 8/26 and 14/32. 4. VASI & REIL rwy 32.

D 3500 FT. WITHIN 10 MI. OF 19.5 DME

DISTANCE FAF TO MAP

900'; 7.5 DME 1160'.
270° 6800'; 270°-360° 2800'

T MINIMUMS

				ALTERNATE		Standard
	C			D		
310	MDA 400	VIS 3/4	HAT 310	MDA 400	VIS 1	HAT 310
462	MDA 560	VIS 1½	HAA 462	MDA 660	VIS 2	HAA 562
702	MDA 800	VIS 2	HAA 702	MDA 1400	VIS 2	HAA 1302

ed for simultaneous reception of VOR/DME and ILS.
CDB VORTAC.
en landing rwy 8.

mply with published Cold Bay SIDs.
o local conditions runway 26.
d as lead-in lights.

ACILITY IDENT.	PROC. NO. AMDT. NO. – EFFECTIVE DATE	SUP. AMDT. DATED
DB (VORTAC)	LOC (BC)/DME Rwy 32, Original	NONE

Jeppesen Approach Chart — NOV 12-71 (11-2)

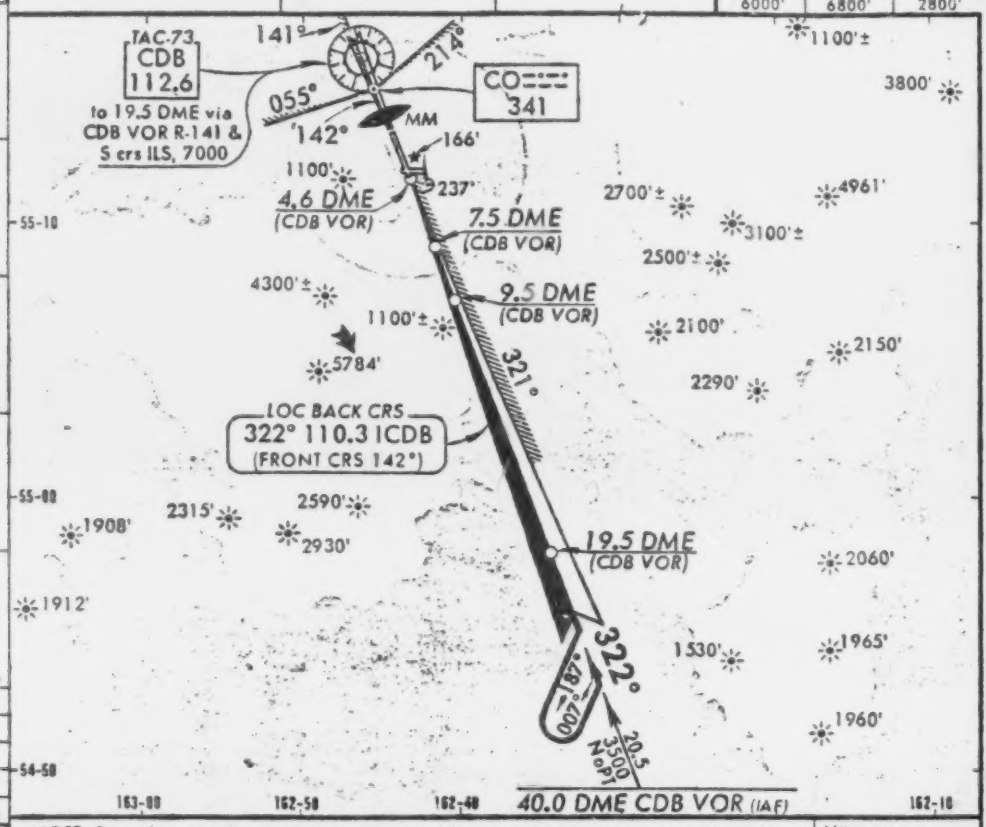
COLD BAY, ALASKA

COLD BAY Radio 122.1 126.7 2861 3023.5G
5631

Apt. Elev 98'
Var 17°E

COLD BAY
LOC (BACK CRS) DME Rwy 32
LOC 110.3 ICDB

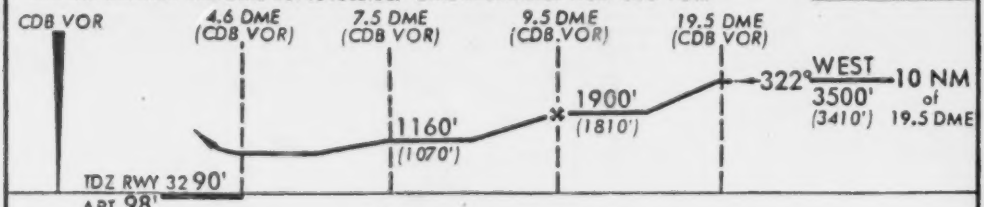
MSA
360° - 090° 6000'
090° - 270° 6800'
270° - 360° 2800'



NOTE: Procedure NA for aircraft not equipped for simultaneous reception of VOR/DME and ILS. Localizer and DME not co-located. DME information from CDB VOR.

Altimeter Setting In INCHES

Scale



PULL UP to 3000 feet on NORTH course ILS within 15 NM.

STRAIGHT-IN LANDING RWY 32

MDA 400' (310')

	HIRL out
A	3/4
B	
C	1
D	1
ALL Non Skd	MDA 440' (350') 1

CIRCLE-TO-LAND

	To Rwy 14 & 26 NA West of Rwy 14-32 MDA	To Rwy 8 MDA DAY	NIGHT
A	560' (462') -1	800' (702') -2	NA
B			
C	560' (462') -1½		
D	660' (562') -2	1400' (1302') -2	NA
All 3 Eng Jet	Non-Skd 760' (662') -2	Non-Skd 1400' (1302') -2	NA

Gnd speed - Kts	60	80	100	120	140	160
MAP at 4.6 DME						

CHANGES: Ground control deleted.

Plan Scale 7.5 NM Per Inch

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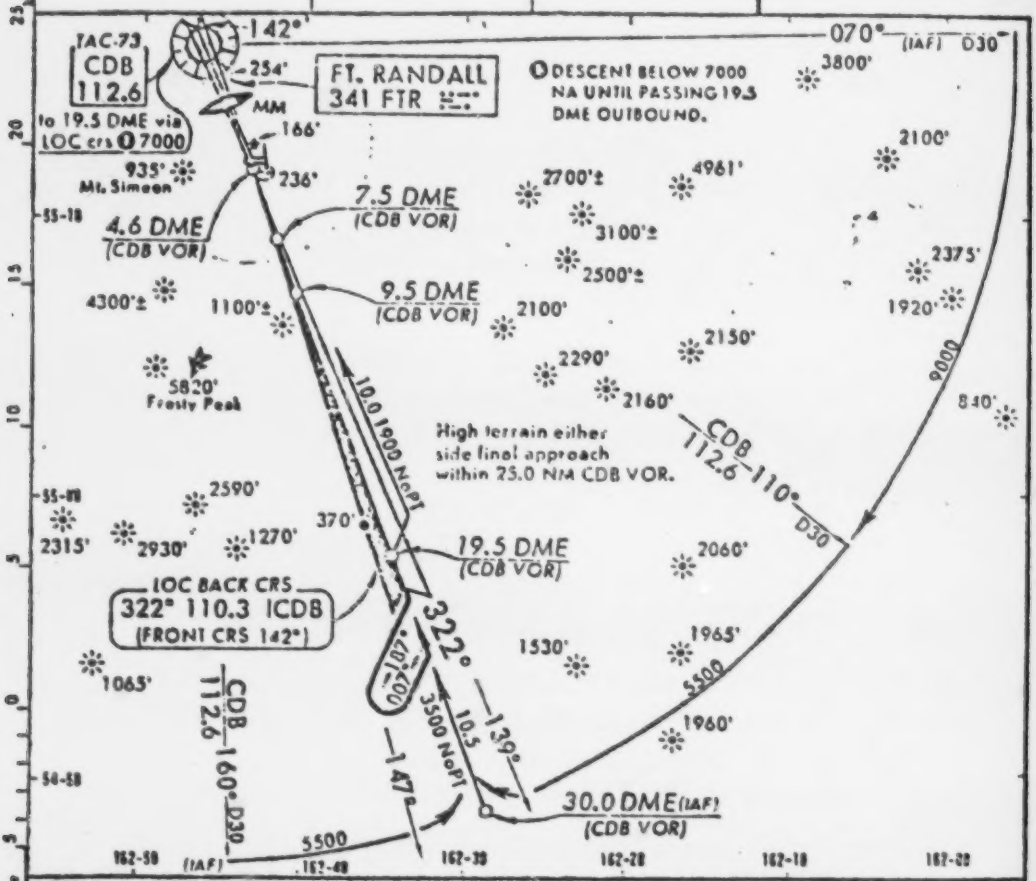
Jeppesen Approach Chart — JUL 12 74 — (11-2)

COLD BAY, ALASKA

COLD BAY

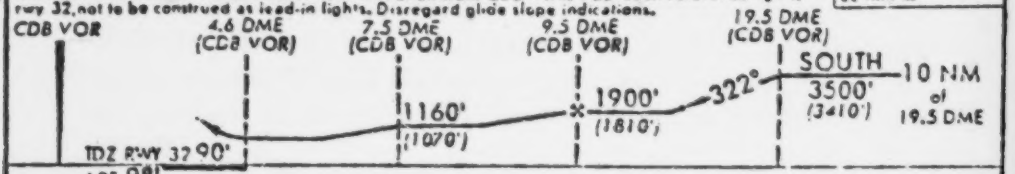
COLD BAY Radio 122.2 126.7 2861 3023.5G
5631

Apt. Elev 98'
Eff Jul 18 LOC DME (BACK CRS) Rwy 32
Var 17°E
IOC 110.3 ICDB



NOTE: Procedure NA for aircraft not equipped for simultaneous reception of VOR-DME and ILS. Localizer and DME not co-located. DME information from CDB VOR. Approach reference lights, rwy 32, not to be construed as lead-in lights. Disregard glide slope indications.

All meter Setting in INCHES



PULL UP: Climb to 3000 feet on NORTH WEST course ICDB ILS localizer within 15 NM.

	STRAIGHT-IN LANDING RWY 32		CIRCLE-TO-LAND		
	MDA 400' (310')		To Rwy 14 & 26 NA West of Rwy 14-32	To Rwy 8	
		HIRL out	MDA	MDA DAY	NIGHT
A	3/4	1	A	560' (462') -1	800' (702') -2	NA
B			B			
C			C	560' (462') -1/2		
D	1		D & J Eng Jet	660' (562') -2	1400' (1302') -2	NA
All Non Std	MDA 440' (350') 1			Non-Std 760' (662') -2	Non-Std 1400' (1302') -2	

7.5 DME	Knots	80	100	120	140	160
MAP at 4.6 DME	Time					
to MDA @ 760'	Rate	320	400	480	560	640

CHANGES: MSA deleted, terminal routes, CO RNG to FTR NDB. Plan Scale 2.5 NM Per Inch

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Appendix D

In the Supreme Court
of the
United States

October Term, 1985

Jeppesen & Company,
Petitioner,

vs.

Barbara A. Brocklesby, et al.,
and the United States of America,
Respondents.

DECLARATION OF ATTORNEY ALBERT R. ABRAMSON, ESQ.

I, ALBERT R. ABRAMSON, declare:

That I am lead counsel for plaintiffs and respondents Barbara A. Brocklesby, et al., and was responsible for the receipt of checks transmitted by the various insurance carriers of Jeppesen & Company and the disbursement of the funds to plaintiffs.

Before filing its Petition for Certiorari Jeppesen's insurers paid off the judgment in four separate payments. Not until the last payment, amounting to only 9% of the judgment, did Jeppesen's attorneys (or anyone else) suggest that Jeppesen would seek further review. Nor did plaintiffs at any time, by acceptance of the last payment or otherwise, consent to Jeppesen seeking further review.

The chronology of these payments is as follows:

On June 20, 1985, a draft in the amount of $6,120,903.32 was transmitted to your declarant as the total amount of coverage of Mission Insurance Company under its primary policy, plus interest and costs. The letter of transmittal by attorney James B. Werner described the payment as "the total amount of coverage plus interest and costs" and neither the letter nor the draft

reflected any reservation of Jeppesen's right to obtain further appellate review.

On June 21, 1985 I received a letter from attorney Charles A. Adamek, of Lord, Bissell & Brook, on behalf of the London Excess Insurers which stated:

> If the court [Ninth Circuit Court of Appeals] still has not ruled as of that date [July 26, 1985], Excess Insurers will review their position in this matter and determine at that time whether they desire to continue the litigation beyond that point.

This letter clearly implies that it was the position of the excess insurers that payment of the judgment would terminate the litigation, and this letter was so understood by your declarant.

On August 13, 1985, attorney Terry W. Backus of Lord, Bissell & Brook, wrote a letter to your declarant specifying the amount of the outstanding balance on the judgment including interest and specifying the manner in which various carriers would pay the outstanding balance without any mention that further appellate review would be sought after payment.

On August 2, 1985 the Ninth Circuit Court of Appeals filed its amended opinion in response to Jeppesen's petition for rehearing and rehearing en banc.

On August 15, 1985, Charles A. Adamek transmitted "an amount which we believe to be the final sum due and owing on behalf of those Underwriters at Lloyd's and London companies whom we represent in this matter," without any mention of seeking further appellate review.

The remaining payment, for 9% of the judgment (or 15% of the excess layer over Mission Insurance Company's primary coverage), was made by Midland Insurance Company in the amount of $1,434,197.63 on September 3, 1985. The draft, made payable to your declarant as trustee for all plaintiffs, stated "$1,434,197.63 for indemnity settlement of all claims Barbara A. Brocklesby, et al."

Plaintiffs never agreed to authorize further appellate review after payments were made on the judgment. If such a condition had been imposed, plaintiffs would not have accepted the money piecemeal nor would they have given partial satisfactions of judgment, but would have demanded complete satisfaction in a single lump sum, allowing interest to accrue at 10.25% until such single lump sum was paid. Plaintiffs accepted partial, piecemeal payments only because they believed such payments were final and granted them the unfettered right to spend the money as they chose without threat of any possible request for repayment. This belief was consistent with representations by counsel for Mission Insurance and Lloyd's that their payments were "total" and "final," indicating their intent to abandon the appeal and not to pursue the case further.

Only on August 29, in connection with the final payment of $1,434,197.63 by Midland Insurance did counsel for petitioner propose for the first time a satisfaction of judgment containing a "without prejudice" clause which your declarant rejected out of hand. On August 30, 1985 in response to my objection, counsel for petitioner then submitted a "complete and full satisfaction of said judgment" for plaintiffs' acknowledgment, which was executed and filed in the District Court. Petitioner's letter of transmittal expressed petitioner's unilateral position that payment would not prejudice petitioner's right "to seek further review and reversal of this judgment and reimbursement of the monies paid in satisfaction of it."

Finally, the last tender of payment was insufficient and was accepted by plaintiffs only in settlement as stated on the draft. When first tendered your declarant had no authority from co-counsel to accept it. Such authority was obtained three days later after additional interest accrued on the judgment in the amount of $1,201, which counsel for petitioner refused to pay. In addition, the parties had an agreement that, rather than require a bond, Jeppesen would pay plaintiffs one-half of each annual premium cost that would otherwise have become due during pendency of the appeal. At the time the last payment was tendered by Midland Insurance, one-half of the third annual renewal premium, amounting to $11,500, had become due and payable.

Jeppesen refused to make the payment. Plaintiffs abandoned their claims for interest and bond premiums, and accepted final payment in settlement without agreeing to any reservation by petitioner of a right for further appellate review, only to bring an end to this protracted litigation.

I declare under penalty of perjury that the foregoing is true and correct. Executed at San Francisco, California on December 30, 1985.

/s/ ALBERT R. ABRAMSON
ALBERT R. ABRAMSON